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Hardie Development Sdn Bhd v David Shen I-Tan (practicing in the name and style of Arkitek Konsult Sabah)

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HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO BKI-24NCC(ARB)-3/6 OF 2021
AMELATI PARNELL JC
28 MARCH 2022

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Arbitration — Award — Partial award — Two matters referred to arbitration — Arbitrator agreed with plaintiff to bifurcate the arbitration proceedings — Arbitrator decided that plaintiff wrongfully terminated architectural service contract — Arbitrator issued partial award in relation to quantum — Plaintiff D *applied to set aside partial award — Defendant applied to enforce partial award as judgment — Whether issuance of partial award contrary to arbitration agreement — Whether issue in relation to quantum should be dealt with in final award and not in partial award — Whether arbitrator had unilaterally altered the procedure — Whether arbitration tribunal empowered to grant pre-award* E *interest — Arbitration Act 2005 ss 37, 38 & 50*

The plaintiff in the present action was a developer whereas the defendant was an architect. The parties had entered into an architectural services contract ('the contract') in relation to a mixed development project. The dispute arose F between the parties when the plaintiff failed to pay the defendant's architectural fees and demanded a letter of release. The plaintiff had proposed a reduced rate of fees in exchange for a promise that the defendant would continue to be appointed as the project architect. The defendant rejected the proposal and consequently, the plaintiff terminated the contract. The dispute G had initially proceeded to the court's action but eventually, the parties agreed, by way of the arbitration agreements, to refer the dispute to arbitration tribunal. In the arbitration proceedings, there were two cases to be decided by the arbitrator, firstly in relation to the liability of the parties regarding the termination of the contract ('Hardie arbitration'), and secondly, the H defendant's action against a company known as Pemaju Industries Bhd ('Pemaju') in relation to tort of inducement of breach of contract ('Pemaju arbitration'). The case proceeded with the hearing of the Hardie arbitration whereby the arbitrator had issued partial award and held that: (a) the plaintiff had wrongfully terminated the contract ('partial award'); and (b) the contract I had not been voided by illegality but was wrongfully terminated by the plaintiff ('Partial Award No 2'). Due to the uncertainties of the continuation of the Pemaju arbitration due to the Covid-19 situation, the arbitrator had decided to give partial award in relation to the quantum ('Partial Award No 3'). In Partial Award No 3, the arbitrator had directed the plaintiff to: (i) pay to the defendant

the net principal sums of RM2,600,724.04 as the amount of outstanding professional fees; (ii) pay to the defendant a pre-award interest of RM1,943,374.40; (iii) bear and pay in full the costs of award for Partial Award, Partial Award No 2 and Partial Award No 3 amounting to RM132,000; and (iv) pay any sum awarded by the learned arbitrator within four weeks from the date of the said award, failing this the defendant was entitled to impose a further interest at a rate of 5%pa. In the present action, the plaintiff had filed an application pursuant to s 37 of the Arbitration Act 2005 ('the AA') and/or under the inherent jurisdiction of the court to set aside Partial Award No 3 ('the plaintiff's application') whereas the defendant had filed an application pursuant to ss 38 and 50 of the AA for the Partial Award No 3 be recognised as binding and be enforced by entry as a judgment against the plaintiff in terms of the said Partial Award No 3 ('the defendant's application'). It ought to be noted that the parties had agreed that the decision of the court on the plaintiff's application would determine the outcome of the defendant's application. Regarding the plaintiff's application, the plaintiff submitted that the arbitrator's decision to proceed to make Partial Award No 3 was not in accordance with the agreement of the parties because both parties agreed in cl 2.5 that the issue of quantum in the Hardie arbitration was to be dealt with in the final award and not in a partial award. With respect to this submission, the issue to be determined was whether the arbitrator had unilaterally altered the procedure. The plaintiff further submitted that the arbitration tribunal was not empowered to grant any pre-award interest. The provisions of the amended AA did not apply to the arbitration between the parties. It was submitted that the arbitration was governed by the pre-amendment AA as it stood on 22 November 2013 when the agreement to arbitrate dated 22 November 2013 was entered into by the plaintiff and defendant. Conversely, the defendant submitted that the arbitrator had the power to grant the pre-award interest and further, under the settlement agreement, the plaintiff agreed to pay interest at the rate of 8%pa to the defendant for any instalments that were in arrears.

Held, setting aside the pre-award interest at para (b) of Partial Award No 3, and enforcing paras (a), (c) and (d) of Partial Award No 3 by entry as a judgment against the plaintiff pursuant to s 38 of the AA:

(1) It was an undisputed fact that Partial Award No 3 was not the final award for the consolidated arbitrations. Further, during the arbitral proceedings, the plaintiff's lead counsel was the one who suggested that the hearing be bifurcated to save time. The bifurcated procedure was adopted with the consent of both parties, although the defendant had initially expressed some reservation on it as shown in the notes of proceedings. This was the mandate given by the parties. Hence, there was no question of the said Partial Award No 3 breaching the terms of the arbitration agreements as alleged by the plaintiff. Having chosen that step, it was not for the plaintiff to complain that there was a breach of

cl 2.5 when the decision on the quantum turned out unfavourable to it (see paras 65, 67, 74, 79–80 & 114).

(2) The power of an arbitrator to grant pre-award interest was derived from the contract and not from the statute. In the present case, there was no such power ever agreed when the parties submitted the dispute to the arbitrator. By operation of the doctrine of stare decisis, the court was bound by the decision of the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1 on the issue of law as to whether an arbitrator may grant pre-award interest, in the absence of any provision in the arbitration agreement permitting the arbitrator to do so. With respect to the defendant's argument that the plaintiff agreed to pay interest at the rate of 8%pa to the defendant, the court agreed with the plaintiff that the arbitrator had no jurisdiction whatsoever to grant pre-award interest as this arbitration was governed by the pre-amended Arbitration Act 2005. In this regard, irrespective of whether the defendant was entitled to such an interest, the arbitrator had no jurisdiction to award any pre-award interest to the defendant (see paras 102–104 & 114).

(3) As regards to the defendant's application, the wording of s 38(1) of the AA was cast in mandatory language by the use of the word 'shall'. Apart from compliance with s 38 of the AA, based on the agreement of the parties that the decision on the plaintiff's application would determine the outcome of the defendant's application, it followed that the defendant's application ought to be allowed except for the pre-award interest (see paras 4 & 112–113).

[Bahasa Malaysia summary

Plaintif dalam tindakan ini adalah seorang pemaju manakala defendan adalah seorang arkitek. Pihak-pihak telah menandatangani kontrak perkhidmatan seni bina ('kontrak tersebut') berhubung dengan satu projek pembangunan campuran. Permasalahan timbul antara pihak-pihak apabila plaintif gagal membayar yuran seni bina defendan dan menuntut surat pelepasan. Plaintif telah mencadangkan agar kadar bayaran dikurangkan dan berjanji bahawa defendan akan terus dilantik sebagai arkitek projek tersebut. Defendan menolak cadangan tersebut dan akibatnya, plaintif menamatkan kontrak tersebut. Pertikaian tersebut pada mulanya telah diteruskan melalui tindakan mahkamah tetapi akhirnya, pihak-pihak bersetuju, melalui perjanjian-perjanjian timbang tara, untuk merujuk pertikaian tersebut ke tribunal timbang tara. Dalam prosiding timbang tara, terdapat dua kes yang perlu diputuskan oleh penimbang tara, pertama berkaitan liabiliti pihak-pihak berkenaan penamatan kontrak tersebut ('timbang tara Hardie'), dan kedua, tindakan defendan terhadap syarikat yang dikenali sebagai Pemaju Industries Bhd ('Pemaju') berhubung dengan tort dorongan kemungkiran kontrak ('timbang tara Pemaju'). Prosiding tersebut diteruskan dengan pendengaran

timbang tara Hardie di mana penimbang tara telah mengeluarkan award separa dan memutuskan bahawa: (a) plaintif telah menamatkan kontrak secara salah ('Award Separa'); dan (b) kontrak tersebut tidak dibatalkan kerana menyalahi undang-undang tetapi telah ditamatkan secara salah oleh plaintif ('Award Separa No 2'). Disebabkan oleh ketidaktentuan sama ada timbang tara Pemaju akan diteruskan atau tidak disebabkan oleh situasi Covid-19, penimbang tara telah memutuskan untuk memberikan award separa berhubung dengan kuantum ('Award Separa No 3'). Dalam Award Separa No 3, penimbang tara telah mengarahkan plaintif untuk: (i) membayar kepada defendan jumlah prinsip bersih sebanyak RM2,600,724.04 sebagai jumlah yuran profesional tertunggak; (ii) membayar kepada defendan faedah pra-award sebanyak RM1,943,374.40; (iii) menanggung dan membayar sepenuhnya kos award bagi Award Separa, Award Separa No 2 dan Award Separa No 3 berjumlah RM132,000; dan (iv) membayar apa-apa jumlah yang diberikan oleh penimbang tara terpelajar dalam tempoh empat minggu dari tarikh award tersebut, jika gagal, defendan berhak untuk mengenakan faedah selanjutnya pada kadar 5% setahun. Dalam tindakan semasa, plaintif telah memfailkan permohonan menurut s 37 Akta Timbang Tara 2005 ('AT') dan/atau di bawah bidang kuasa sedia ada mahkamah untuk mengenepikan Award Separa No 3 ('permohonan plaintif') manakala defendan telah memfailkan permohonan menurut ss 38 dan 50 AT agar Award Separa No 3 diiktiraf sebagai mengikat dan dikuatkuasakan melalui kemasukan sebagai penghakiman terhadap plaintif berdasarkan terma-terma Award Separa No 3 tersebut ('permohonan defendan'). Perlu diingatkan bahawa pihak-pihak telah bersetuju bahawa keputusan mahkamah ke atas permohonan plaintif akan menentukan keputusan permohonan defendan. Berkenaan permohonan plaintif, plaintif berhujah bahawa keputusan penimbang tara untuk meneruskan dengan membuat Award Separa No 3 adalah tidak mengikut persetujuan pihak-pihak kerana kedua-dua pihak bersetuju dalam klausa 2.5 bahawa isu kuantum dalam timbang tara Hardie perlu ditentukan dalam award akhir dan bukan dalam award separa. Berkenaan dengan hujahan ini, isu yang perlu ditentukan ialah sama ada penimbang tara telah mengubah prosedur secara unilateral. Plaintif seterusnya berhujah bahawa tribunal timbang tara tidak diberi kuasa untuk memberikan apa-apa faedah pra-award. Peruntukan AT yang dipinda tidak terpakai untuk timbang tara antara pihak-pihak. Plaintif berhujah bahawa timbang tara tersebut ditadbir oleh AT pra-pindaan seperti yang ditetapkan pada 22 November 2013 apabila perjanjian timbang tara bertarikh 22 November 2013 telah dimeterai oleh plaintif dan defendan. Sebaliknya, defendan berhujah bahawa penimbang tara mempunyai kuasa untuk memberikan faedah pra-award dan seterusnya berhujah bahawa di bawah perjanjian penyelesaian, plaintif bersetuju untuk membayar faedah pada kadar 8% setahun kepada defendan untuk apa-apa ansuran yang tertunggak.

Diputuskan, mengenepikan faedah pra-award di dalam perenggan (b) Award Separa No 3, dan menguatkuasakan perenggan (a), (c) dan (d) Award Separa

No 3 melalui kemasukan sebagai penghakiman terhadap plaintif berdasarkan s 38 AT:

(1) Adalah fakta yang tidak dapat dipertikaikan bahawa Award Separa No 3 bukanlah award akhir bagi timbang tara yang disatukan tersebut. Selanjutnya, semasa prosiding timbang tara, peguam utama plaintif yang mencadangkan supaya pendengaran dibuat secara dua peringkat untuk menjimatkan masa. Prosedur dua peringkat ini telah diterima pakai dengan persetujuan kedua-dua pihak, walaupun defendan pada mulanya menyatakan beberapa keraguan mengenainya seperti yang ditunjukkan dalam nota prosiding. Ini adalah mandat yang diberikan oleh pihak-pihak. Oleh itu, tidak timbul persoalan mengenai Award Separa No 3 tersebut melanggar terma perjanjian-perjanjian timbang tara seperti yang didakwa oleh plaintif. Setelah memilih langkah tersebut, plaintif tidak berhak untuk mengadu bahawa terdapat pelanggaran klausa 2.5 apabila keputusan tentang kuantum tersebut tidak menguntungkannya (lihat perenggan 65, 67, 74, 79–80 & 114).

(2) Kuasa penimbang tara untuk memberikan faedah pra-award diperoleh daripada kontrak dan bukan daripada statut. Dalam kes ini, tidak ada kuasa sedemikian yang pernah dipersetujui apabila pihak-pihak merujuk pertikaian tersebut kepada penimbang tara. Dengan pelaksanaan doktrin stare decisis, mahkamah terikat dengan keputusan Mahkamah Persekutuan di dalam kes *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appelas* [2018] 1 MLJ 1 mengenai isu undang-undang sama ada penimbang tara boleh memberikan faedah pra-award jika tiada apa-apa peruntukan dalam perjanjian timbang tara yang membenarkan penimbang tara berbuat demikian. Berkenaan dengan hujah defendan bahawa plaintif bersetuju untuk membayar faedah pada kadar 8% setahun kepada defendan, mahkamah bersetuju dengan plaintif bahawa penimbang tara tidak mempunyai bidang kuasa untuk memberikan faedah pra-award kerana timbang tara ini dikawal oleh Akta Timbang Tara 2005 pra-pindaan. Dalam hal ini, tidak kira sama ada defendan berhak mendapat faedah sedemikian, penimbang tara tidak mempunyai bidang kuasa untuk memberikan apa-apa faedah pra-award kepada defendan (lihat perenggan 102–104 & 114).

(3) Berkenaan dengan permohonan defendan, perkataan di dalam s 38(1) AT dibuat dalam lenggok bahasa mandatori dengan menggunakan perkataan 'shall'. Selain daripada pematuhan s 38 AT tersebut, berdasarkan persetujuan pihak-pihak bahawa keputusan ke atas permohonan plaintif akan menentukan keputusan permohonan defendan, maka, permohonan defendan harus dibenarkan kecuali permohonan untuk faedah pra-award (lihat perenggan 4 & 112–113).]

Cases referred to

AMDAC (M) Sdn Bhd v BYD Auto Industry Co Ltd [2020] 11 MLJ 281; [2020] 6 CLJ 625, HC (distd)

Antara Steel Mills Sdn Bhd v CIMB Insurance Brokers Sdn Bhd [2015] 6 MLJ 248; [2015] 5 CLJ 1018, CA (refd)

Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal [2018] 4 MLJ 799; [2018] 2 CLJ 257, CA (refd)

Bumimetro Construction Sdn Bhd v Monday-Off Development Sdn Bhd & other cases [2018] 1 LNS 2137, HC (folld)

Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1; [2018] 1 CLJ 693, FC (folld)

Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401; [2004] 1 CLJ 743, FC (refd)

Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals [2020] 1 MLJ 311; [2020] 1 CLJ 193, FC (refd)

Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal [2020] 1 MLJ 174; [2020] 1 CLJ 299, FC (refd)

Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd and another appeal [2021] 4 MLJ 622, CA (distd)

London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd [1958] 1 All ER 494, QBD (distd)

Mammoth Empire Construction Sdn Bhd v Kenwise Sdn Bhd and another summons [2020] MLJU 1473; [2020] 1 LNS 1145, HC (refd)

National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99, SC (refd)

Pembinaan Limbongan Setia Berhad v Josu Engineering Construction Sdn Bhd [2020] MLJU 192; [2020] 1 LNS 111, HC (refd)

Tokio Marine Insurans (M) Berhad v Hi-Poly Industries Sdn Bhd [2020] MLJU 1446; [2020] 1 LNS 1477, HC (refd)

UDA Land Sdn Bhd v Puncak Sepakat Sdn Bhd [2020] MLJU 892; [2020] 1 LNS 877, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 33(6), 37, 37(1)(a)(iii), (1)(a)(iv), (1)(a)(v), (1)(a)(vi), (1)(b)(ii), (2), 38, 38(1), 42, 50

Architects (Scale of Minimum Fees) Rules 1986 (revoked by Architects (Scale of Minimum Fees) Rules 2010)

Architects Rules 1996 Fourth Schedule

Interpretation Acts 1948 and 1967 s 30(1)(b)

T Kuhendran Thanapalasingam (with Eric Chong) (J Marimutu & Partners) for the plaintiff.

Norbert Yapp (Norbert Yapp & Assoc) for the defendant.

Amelati Parnell JC:

INTRODUCTION

[1] At the request of the parties, the above two originating summons registered under Case No BKI-24NCC(ARB)-3/6 of 2021 and Case No BKI-24NCC(ARB)-4/6 of 2021(HC5) were jointly heard on the 12 January 2022.

[2] For Case No BKI-24NCC(ARB)-4/6 of 2021(HC5), DAVID SHEN I-TAN ('David Shen') had filed an originating summons application, pursuant to ss 38 and 50 of the Arbitration Act 2005 ('the AA 2005') for the Partial Award No 3 dated 17 March 2021 made by the arbitrator Mr Chong Thaw Sing ('Partial Award No 3') in matter of an arbitration be recognised as binding and be enforced by entry as a judgment against the Hardie Development SDN BHD in terms of the said Partial Award No 3.

[3] On the other hand Hardie Development SDN BHD ('Hardie Development') via Case No BKI-24NCC(ARB)-3/6 of 2021 had file in originating summons application for the said partial award dated No 3 dated 17 March 2021 by the arbitrator, Mr Chong Thaw Sing to be set aside pursuant to s 37 of the AA 2005 and/or under the inherent jurisdiction of this court.

[4] As the issue herein in both applications are related to the same said 'Partial Award No 3', I shall deal with Hardie Development's application under BKI-24NCC(ARB)-3/6 of 2021 first which will have bearing to David Shen's application in BKI-24NCC(ARB)-4/4 of 2021 (HC5). The position taken by the parties at the commencement of the hearing was that the decision on BKI-24NCC(ARB)-3/6 of 2021 will determine the outcome of BKI-24NCC(ARB)-4/4of 2021 (HC5). This was clearly stated by parties during the hearing of the matter on 12 January 2022:

> Mr Yapp: That is my application to register the Award. I will stick to my written submission so if this Court dismisses case ie BKI-24NCC(ARB)-3/6 of 2021 then it should follow that Award should be registered as a judgment. That is all.
>
> Mr TKuhendran: We agree to that ...

ORIGINATING SUMMONS NO BKI-24NCC(ARB)-3/6 OF 2021

[5] This application is made by Hardie Development ('the plaintiff') for the partial award dated No 3 dated 17 March 2021 by the arbitrator, Mr Chong Thaw Sing ('Partial Award No 3') to be set aside pursuant to s 37 of the AA 2005 and/or under the inherent jurisdiction of this honourable court.

[6] The cause papers relating to the plaintiff's application are:

(a) plaintiff's originating summons dated 16 June 2021 pursuant to s 37 of the Arbitration Act 2005 ('plaintiff's OS');

(b) plaintiff's affidavit in support affirmed by Sim Men Kin @ Andrew Sim in support of plaintiff's OS on 16 June 2021;

(c) defendant's affidavit in opposition affirmed by David Shen I-Tan on 12 July 2021; and

(d) plaintiff's affidavit in reply affirmed by Sim Men Kin @ Andrew Sim on 25 August 2021.

BACKGROUND

[7] The factual matrix forming the background of the case is not in dispute. The salient background facts pertaining to the arbitration proceedings are as follows.

[8] The arbitration proceedings arose out of a dispute over an architectural services contract entered into between the plaintiff and David Shen ('the defendant') over a mixed development project measuring 44.28 hectares situated in Menggatal, Kota Kinabalu, Sabah which was being undertaken by the plaintiff on a joint venture basis with a state government agency ('the project').

[9] On or about 9 September 2002, the defendant forwarded to the plaintiff his fee proposal for the architectural services in respect of the project. The fee proposal was based on the estimated cost of construction at the material time, namely, RM150m which worked out to around 2.5%. It also depends on the categories of building works.

[10] Subsequently, as a result of further changes being made to the schematic design of the proposed development, the defendant by letter dated 22 July 2003 forwarded its revised fee proposal to the plaintiff. In the said letter, the defendant had expressly informed the plaintiff that being a registered architect, his appointment as the project architect would be in accordance with the Architects Act and the Rules made thereunder.

[11] By a letter of appointment dated 11 August 2003, the plaintiff agreed to engage the defendant as the architectural consultant to provide architectural services, ie, land use planning and comprehensive basic architectural services ('the said agreement') — see exhibit marked 'DS5'.

A **[12]** Pursuant to the said engagement, the defendant duly discharged his duties and obligations as the architect for the said project as set out in the said agreement and defined in the 'Conditions of Engagement' in the Third Schedule and the memorandum of agreement in the Fourth Schedule of the Architects Rules 1996.

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[13] By letter dated 7 January 2009, the defendant informed the plaintiff that based on the Preliminary Cost Appraisal No 4 dated 5 June 2008 by the quantity surveyor, JUBM Sdn Bhd ('JUBM'), the estimated total construction costs will be in the region of RM368,365,279.27.

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[14] By letter dated 19 February 2009, the defendant furnished to the plaintiff with the new computation of the architectural fees payable based on the latest estimated construction costs of RM281,365,000 which was estimated to be 4.04% or RM15,407,146. The defendant further informed the plaintiff that the fees due and payable to the defendant for work done up to that stage was approximately RM2,426,625.50 (inclusive of the 5% Government service tax).

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E **[15]** Further, vide a letter dated 2 September 2009, the defendant informed the plaintiff that the revision to the approved development plan and revisions to the approved building plans thereon were considered additional works according to the Architects (Scale of Minimum Fees) Rules 1986 and that additional fees were chargeable accordingly.

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[16] On 4 August 2009, the plaintiff's then managing director, Mr Andrew Sim took the defendant to meet with one, Dato' Chua Tiong Moon ('Dato' Chua') who is a substantial shareholder of Pemaju Industries Bhd. The purpose of the meeting was to discuss about the settlement of the substantial outstanding fees owed to the defendant, in connection with the professional services rendered from 2002 up to the completion of development planning phase and the building planning phase for Phase 1A, 1B, 1C, 1D, 2A, 2B, 2C, 2D, 2E, 2F, 2G and 2H. The outstanding fees were in excess of RM3m. As requested by Dato' Chua, the defendant had written to the plaintiff vide letter dated 24 September 2009, that based on the plans submitted and approved by DBKK, the overall professional fee percentage was 3.8% in accordance with the Architects (Scale of Minimum Fees) Rules 1986.

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I **[17]** Subsequently, at a meeting held on the 14 October 2009, Dato' Chua assured the defendant that the defendant will continue to be appointed as the project architect and proposed that the outstanding fees would be settled over a period of five years, the time frame which Dato' Chua estimated would take the plaintiff to complete the said project.

[18] On 15 October 2009, Dato' Chua sent a personal note to the defendant, setting out his proposal for the settlement of the defendant's outstanding fees. Dato' Chua proposed to the defendant that the scale of fees be reduced to the rate of 2.3% from 3.8% with the assurance that the defendant will continue to be the project architect.

[19] Upon receipt of the said note, the defendant informed Dato' Chua by letter dated 15 October 2009 that the offer is not acceptable because it did not acknowledge work done and fee due to the defendant to date.

[20] Further discussions with Dato' Chua followed, which eventually led to the issuance of the plaintiff's proposal letter dated 14 December 2009. In the said letter, the plaintiff acknowledged that the defendant's work completed to date shall be 45% of the preliminary construction cost estimated at RM350m and that the defendant's fees shall be adjusted based on the final and actual contract sum. The plaintiff further offered to settle the outstanding fees by instalment over a six years period instead of five as discussed.

[21] On 2 May 2011, the defendant responded to the purported termination notice and informing the plaintiff that the termination of professional services requires all outstanding professional fees and reimbursable to be settled in full before a letter of release could be issued. At the material time, the outstanding amount due to the defendant was RM3,182,551.92.

[22] On the 10 June 2011, the plaintiff instructed its then solicitors, Messrs Fernandez & Co to write to the defendant demanding a letter of release and threatened to take the defendant to court.

[23] The defendant through its solicitors, Messrs Norbert Yapp & Assoc responded vide a letter dated 17 June 2011 reminding the plaintiff that the defendant will not issue a letter of release unless and until the termination of the defendant's services is done properly and on valid grounds and any outstanding fees must be settled in full.

CIVIL SUITS AND ARBITRAL PROCEEDINGS

[24] Not long thereafter, the plaintiff filed a suit against the defendant at the Kota Kinabalu High Court vide Suit No BKI-22–224 of 10 of 2011 on 14 October 2011 claiming for, inter alia:

(a) special damages in the sum of RM1,968,000 allegedly arising from the defendant's failure to produce the architectural drawings in accordance to plaintiff's instructions;

(b) a declaration that an oral agreement entered between the plaintiff and the defendant that the plaintiff would immediately terminate the services of the defendant as and when the plaintiff was ready to appoint another architect and that the defendant would accept such termination and issue the plaintiff the usual letter of release;

(c) a declaration that the defendant's services had been lawfully terminated pursuant to the alleged oral agreement entered between the parties; and

(d) an order for specific performance to compel the defendant to issue the letter of release to enable the plaintiff to appoint another professional architect to continue with the architectural work for the said project.

[25] On 10 April 2012 the defendant filed a writ action against the plaintiff and Pemaju Industries Bhd in the High Court at Kota Kinabalu under Suit No BKI-22–63/4 of 2012 for the following reliefs:

(a) a declaration that the defendant's services have been wrongfully terminated;

(b) damages comprising the outstanding professional fees of RM2,590,724.04;

(c) interest on the said sum of RM2,590,724.04;

(d) damages for loss of income for balance of work prematurely terminated amounting to RM9,841,702.83; and

(e) alternatively, damages to be assessed.

[26] During the case management of the plaintiff's suit, the learned judge suggested to the parties' counsel to refer the disputes to arbitration since it is technical in nature. The plaintiff's suit against the defendant was eventually discontinued as parties agreed to refer their disputes to arbitration. By letter dated 21 February 2013, the defendant's solicitors wrote to Mr Chong Thaw Sing to inform him that the parties have jointly agreed to appoint him as the sole arbitrator and asked whether he will accept the appointment.

[27] During the case management of the arbitration proceedings, the learned arbitrator suggested that since the arbitration proceedings did not originate from any written arbitration proceedings, it would be advisable to execute an ad hoc arbitration agreement to formaliae the parties' agreement to refer their disputes to arbitration.

[28] Accordingly, the parties executed an ad hoc arbitration agreement dated 22 November 2013. Under the said agreement, parties mutually agreed the scope of the arbitration would be in relation to 'all disputes or differences

relating to and/or arising from and/or in connection with the project between the parties and as set out in Appendix 1 of the agreement' — see exhibit marked 'DS20'.

[29] However, when the learned arbitrator came to know that the dispute between the defendant and Pemaju Industries Bhd in relation to the claim under the tort of inducing a breach of contract under Suit No BKI-22–63/4 of 2012 will continue to be litigated in the court, he advised the parties to consider whether they want to refer the dispute to arbitration to be heard together with the first arbitration ('Hardie arbitration') so as to avoid any conflicting decisions. The parties accepted the recommendation of the learned arbitrator and duly executed and ad hoc arbitration agreement dated 17 November 2014 — see exhibit marked 'DS21'.

[30] At the commencement of the arbitral hearing on 26 January 2016, counsel for the plaintiff had proposed to the tribunal that the issue of liability in the Hardie arbitration be determined first, before venturing into the defendant's tort claim in the other arbitration against Pemaju Industries Bhd ('Pemaju arbitration').

[31] It was further suggested that if the tribunal finds there was indeed a breach of contract, then there is no need to go back to adduce further evidence for the Pemaju arbitration in relation to the issue of breach of contract but the further evidence will be confined to the issue whether Pemaju procured or induced the breach of contract — see exhibit marked 'DS22' the relevant portions of the notes of proceedings (pp 1–17) as to what transpired at the hearing on 26 January 2016 with regard to the plaintiff's proposal to bifurcate the hearing.

[32] It is common ground that the hearing proceeded with the taking evidence on the issue of liability and quantum in relation to the Hardie arbitration including the counterclaim filed by the plaintiff.

[33] The learned arbitrator issued his partial award on 10 April 2018 holding that the plaintiff had wrongfully terminated the contract.

[34] Being dissatisfied with the decision of the learned arbitrator, the plaintiff filed an application to set aside the partial award dated 10 April 2018 under Originating Summons No BKI-24NCC(ARB)-1/5 of 2018. The court gave its ruling on the 5 December 2018 dismissing the plaintiff's application — see exhibit marked 'DS1' annexed to the defendant's affidavit in opposition. This decision has been affirmed by the Court of Appeal on 17 November 2021.

[35] After the court dismissed the plaintiff's setting-aside application made

under ss 37 and 42 of the Arbitration Act, the defendant requested the learned arbitrator to resume hearing of the final award. However, during the case management hearing fixed by the learned arbitrator, the plaintiff's solicitors insisted that the tribunal should decide by way of another partial award the issue of illegality pertaining to the appointment of the defendant. Although the defendant objected to the bifurcation of the hearing, the learned arbitrator agreed to determine the issue of illegality as a partial award — see the directions of the learned arbitrator exhibited as 'DS23'.

[36] After the conclusion of the bifurcated hearing, the learned arbitrator published the Partial Award No 2 dated 7 October 2019. It is the finding of the learned arbitrator that the contract of engagement between the plaintiff and defendant has not been voided by the alleged illegality but was wrongfully terminated.

[37] Subsequently, the plaintiff made a second application to set aside the Partial Award No 2 under Originating Summons No BKI-24NCC(ARB)-3/11 of 2019 pursuant to ss 37 and 42 of the Arbitration Act 2005. The setting aside application was dismissed by the High Court on 21 May 2020 — see exhibit marked 'DS2' annexed to the defendant's affidavit in opposition. This decision has been affirmed by the Court of Appeal on 17 November 2021.

[38] Pending the disposal of the setting aside application for Partial Award No 2, the learned arbitrator fixed the continuation of the arbitral hearing for the Pemaju arbitration on 13 July 2020 to 16 July 2020. The hearing dates were fixed during a case management on 28 November 2019. However, due to travel restrictions and disagreement of the plaintiff in proceeding with a virtual hearing, no further physical hearings were scheduled thus far.

[39] On the 10 October 2020, the learned arbitrator informed the parties that in view of the uncertainties over the continuation of the Pemaju arbitration due to the Covid-19 situation, and taking into consideration that complete submissions (liability and quantum) have been made for the Hardie arbitration, it is appropriate for the tribunal to render a quantum award for the Hardie arbitration — see exhibit marked 'DS32' annexed to the defendant's affidavit in opposition.

[40] By letter dated 14 October 2020, the plaintiff's solicitors wrote to the learned arbitrator to protest against the making of the partial award on quantum. However, the defendant's solicitors responded by stating that the making of the proposed Partial Award No 3 is within the jurisdiction of the

learned arbitrator. Further, it is not disputed by the plaintiff that complete submissions have been made on the issue of liability and quantum — see exhibit marked 'DS33'.

[41] It is undisputed fact that before making his Partial Award No 3, the learned arbitrator invited both parties to provide him with an updated submission on the quantum, which the parties have duly complied with. As a matter of fact, the plaintiff filed a 23 pages long updated written submission dated 16 December 2020 and a rebuttal dated 30 December 2020 — see exhibit marked 'DS35(a)' and 'DS35(b)' annexed to the defendant's affidavit in opposition.

[42] The learned arbitrator issued his Partial Award No 3 on 17 March 2021 where he found in favour of the defendant where, inter alia, the plaintiff is directed to:

(a) pay to the defendant the net principle sum of RM2,600,724.04 as the amount of outstanding professional fees;

(b) pay to the defendant a pre-award interest of RM1,943,374.40;

(c) bear and pay in full the costs of award for partial award, Partial Award No 2 and Partial Award No 3 amounting to RM132,000; and

(d) pay any sum awarded by the learned arbitrator within four weeks from the date of the said award, failing this the defendant is entitled to impose a further interest at a rate of 5%pa.

THE PLAINTIFF'S CONTENTIONS

[43] The plaintiff's application is made pursuant to s 37 of the Arbitration Act 2005, in particular s 37(1)(a)(iii), 37(1)(a)(iv), 37(1)(a)(v), 37(1)(a)(vi) and 37(1)(b)(ii) of the AA 2005 which provides as follows:

> 39 Grounds for Refusing Recognition or Enforcement
>
> (1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked ...
>
> (a) where that party provides to the High Court proof that —
>
> (i) ...
>
> (ii) ...
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
>
> (iv) the award deals with a dispute not contemplated by or not falling

A within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties ...; or

B

(vii) ... ; or

(b) the High Court finds that —

(i) ...

C

(ii) the award is in conflict with the public policy of Malaysia.

[44] Perusing the plaintiff's submissions, it focusses on two areas warranting the refusal of recognition or enforcement of Partial Award No 3, namely:

D

(a) agreement of the parties; and

(b) interest.

E **[45]** In respect of the issue of agreement of the parties, it was submitted that the arbitrator's decision to proceed to make Partial Award No 3 was not in accordance with the agreement of the parties. Both parties agreed that the issue of quantum in the Hardie arbitration was to be dealt with in the final award and not in a partial award.

F

[46] As to the issue on interest, the learned counsel for plaintiff submits that the tribunal is not empowered to grant any pre-award interest. The provisions of the amended AA 2005 do not apply to the arbitration between the parties. It was submitted that the arbitration is governed by the pre-amendment AA 2005 as it stood on 22 November 2013 when the agreement to arbitrate dated 22 November 2013 was entered into by the plaintiff and defendant.

G

THE DEFENDANT'S CONTENTIONS

H **[47]** Counsel for the defendant on the other hand submitted that the plaintiff's application to set aside the Partial Award No 3, just like the Partial Award No 1 dated 10 April 2018 and Partial Award No 2 dated 7 October 2019, is misconceived in law and in fact. There is no justifiable ground for the plaintiff to invoke ss 37(1)(a)(iii), 37(1)(a)(iv), 37(1)(a)(v), 37(1)(a)(vi), and 37(1)(b)(ii) of the AA 2005.

I

[48] It is an undisputed fact that the Partial Award No 3 made by the learned arbitrator is not the final award for the consolidated arbitrations. Hence, it was

submitted that there is no question of the said Partial Award No 3 breaching the terms of the arbitration agreements as alleged by the plaintiff in para 6 of the affidavit in support.

[49] With regard to pre-award interest, counsel for the defendant submits that following the amendment made to s 33(6) of the AA 2005 which came into force on 8 May 2018, the learned arbitrator is now empowered to grant pre-award interest on the outstanding fees. The learned arbitrator did not err in law or in fact in awarding pre-award interest for the fees due to the defendant. In any event, under the settlement agreement, the plaintiff agreed to pay interest at the rate of 8%pa to the defendant for any instalments that were in arrears.

[50] Counsel for the defendant further contended that there is no basis for the plaintiff to apply for the setting aside of the Partial Award No 3 based on s 37(1)(b)(ii) of the Arbitration Act. The Partial Award No 3 does not conflict with the public policy of Malaysia as defined in s 37(2) of the Act.

ANAYSIS AND FINDINGS

[51] I am mindful of the position of the law and the approach that the courts had taken on the test for intervention will relate to cases where the award suffers from patent injustice and/or where the award is manifestly unlawful and unconscionable. The power to set aside an award can only be exercised where the arbitrator has misconducted himself, or the award has not been properly procured. Essentially s 37 of the AA 2005 encapsulates the setting aside principle on the basis of 'excess of jurisdiction' on the part of an arbitral tribunal.

[52] In *Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal* [2018] 4 MLJ 799; [2018] 2 CLJ 257, it was stated by Justice Hamid Sultan Abu Backer JCA in the Court of Appeal that:

> [22] ... The test for intervention will relate to cases where the award suffers from patent injustice and/or where the award is manifestly unlawful and unconscionable. Usually, the consideration which needs to be taken into account at the initial stage itself will include whether: (i) the point of law attempted to be raised will have substantial effect on the arbitration; (ii) the point have been raised before the arbitrator; (iii) arbitrator's decision must be obviously wrong or the question must be of general public importance and open to serious doubt; (iv) it must be just and proper for the court to determine the question.

[53] In *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401; [2004] 1 CLJ 743, the Federal Court held that errors by an arbitrator such as drawing wrong inferences of fact from the evidence before him is not itself, a

sufficient reason to warrant his award being set aside. In essence, what it means is that parties who submit disputes to arbitration bind themselves to honor the arbitrator's award on the facts. Further, the principle of party autonomy decrees that a court ought not to question the arbitrator's findings of fact. A failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct.

[54] This principle was later followed in the Federal Court case of *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693 where Justice Jeffrey Tan FCJ held that:

> [153] Where it is a question of fact, 'The arbitrators (remain) the masters of the facts. On an appeal the court must decide any questions of law arising from the award on the basis of full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers these findings to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be or what the scale of the financial correspondences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. *The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.* (the 'Baleares' at p 228). '... on findings of facts an arbitrator is the sole judge. Further, whether he drew the wrong inferences of facts from the evidence itself is not sufficient as a ground to warrant setting aside his award (see *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555)' (*Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49; [2003] 1 CLJ 103 per Richard Malunjum JCA, as he then was). '... if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him, be it oral or documentary, that in itself is not sufficient to warrant setting aside of his award. *It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood'* per Raja Azlan Shah J (as he then was) in *Syarikat Pemborong Pertanian & Perumahan v Federal Law Development* [1971] 2 MLJ 210; [1969] 1 LNS 172' (*Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401; [2004] 1 CLJ 743 per Siti Norma Yaakob FCJ, as she then was, delivering the judgment of the court).

[55] In addition, it should be further noted that s 37 is not an appellate provision. This principle is reaffirmed by the Court of Appeal in *Antara Steel Mills Sdn Bhd v CIMB Insurance Brokers Sdn Bhd* [2015] 6 MLJ 248; [2015] 5 CLJ 1018 which held, as per Mohd Hishamudin Yunus JCA: '[18] Under the Arbitration Act, there is no right of appeal against the decision of the arbitral tribunal. The decision of the arbitral tribunal is final, binding and unappealable'.

[56] In the present case, by focusses on two areas warranting the refusal of recognition or enforcement of Partial Award No 3, namely: (a) agreement of the parties; and (b) interest, the plaintiff had abundance its reliance on conflict with the public policy of Malaysia as defined in s 37(2) of the Arbitration Act.

[57] This has been reiterated by the plaintiff in it's rebuttal submission (encl 19) that the plaintiff's case is focused on ss 37(1)(a)(iv), (v) and (vi) and *not the public policy ground in s 37(1)(b)(ii)*.

[58] Hence, the two areas of contention will be deliberated below.

ALLEGATION THAT PARTIAL AWARD NO 3 IS NOT IN ACCORDANCE WITH THE AGREEMENT OF THE PARTIES (QUANTUM)

[59] The main thrust of the plaintiff's argument was that both parties agreed that the issue of quantum in the Hardie arbitration was to be dealt with in the final award and not in a partial award.

[60] In this regard, the learned counsel for the plaintiff relies on the following passage from Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd Ed, 1989) at p 291:

> 7 Alterations in procedure
>
> An arbitrator occasionally comes to recognise, in the course of a reference, that the procedure which he is adopting is not the one best fitted to produce a just and convenient resolution of the dispute. *The question will then arise whether he has a power to adopt a different procedure, without the consent of the parties. Plainly, he has none, if the original procedure is the one expressly laid down by the Arbitration agreement, or by a subsequent agreement between the parties ...*

[61] The plaintiff refers to the case of *London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 1 All ER 494 at p 497, wherein Diplock J, inter alia, held:

> Where the award has been made by the arbitrator in breach of the agreed procedure, the applicant is entitled to have it set aside, not because there has been necessarily any breach of the rules of natural justice, but simply because the parties have agreed to be bound by an award made by the procedure in fact adopted ...

[62] Reference was also made to the case of *Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd and another appeal* [2021] 4 MLJ 622, where the Court of Appeal, inter alia, held that:

> [144] Since the arbitrator ignored, or overlooked, or was plainly oblivious or

A nonchalant to the timeline stipulated in article 21.3 of the PAM Rules, and as there is no scope for any waiver, it follows that the arbitrator was no longer following the rules of arbitration.

[145] Such conduct on the arbitrator part falls neatly within s 37(1)(a)(vi) of the Act which provides that an award may be set aside if 'the arbitral procedure was not in accordance with the agreement of the parties'.

...

[160] In the result, we agree with the judge that by failing to deliver the original award within the time frame stipulated in the PAM Rules (dateline of 26 April 2016) and in further failing to extend the deadline as provided for, before delivering the original award on 10 March 2017 (about 13 months later), the original award was delivered 'without mandate or authority' and is therefore in excess of the arbitrator's jurisdiction. The original award (and by extension the amended award) was properly and validly set aside pursuant to s 37(1)(a)(vi) of the Act.

[63] The question to be asked in our present case, is whether the learned arbitrator unilaterally alter the procedure? Section 37(1)(a)(iv) of the AA 2005 refers to a case where the arbitrator has dealt with a dispute which does not fall within the scope of the arbitration agreement. Section 37(1)(a)(v) refers to a case where the arbitrator has given decisions on matters which are beyond the scope or outside the questions submitted. The difference between the two is that the first is based on the arbitral clause while the second is based on the mandate given by the parties. Section 37(1)(a)(vi) deals with the situation whereby the arbitration proceedings or tribunal was not in accordance with the agreement of the parties.

[64] The arbitral clause herein is found at cl 2.5 of the agreement which provides as follows:

2.5. The Parties have agreed that one (1) Award shall be published by Mr CHONG THAW SING in respect of the Disputes.

[65] As can be seen at the arbitral hearing on the 26 January 2016, it was the plaintiff's lead counsel who suggested/proposed that the hearing be bifurcated to save time. The bifurcated procedure was adopted with the consent of both parties, although the defendant had initially expressed some reservation on it as shown in the notes of proceedings. This is the mandate given by the parties.

[66] The parties have during the course of the arbitration proceedings agreed on the procedural stages which the arbitration is to proceed in order to save time and avoid repetition of evidence. The learned arbitrator has clearly set out in para 11 of his Partial Award No 3 dated 17 March 2021 regarding the issue which he is required to determine and is indeed relevant passage for consideration by this court. This is what the learned arbitrator has stated in

para 11 of his Partial Award No 3:

> 11. As the cause of action of Permaju arbitration depends on the outcome of Hardie arbitration, the parties agree to bi-furcate the arbitration proceeding. Part 1 of the arbitration will be entirely on the determination of liability in the Hardie arbitration and Part 2, if it proceeds further will follow next. An affirmative finding by the tribunal in the partial award that the Claimant's professional service contract had been unlawfully terminated will trigger the Part 2, Permaju arbitration. The tribunal did find the termination unlawful. Nonetheless, at the request of Hardie, the tribunal agreed to dispose of the issue of illegality left undetermined in the partial award by publishing Partial Award No 2. If Partial Award No 2 ruled that David Shen's action to charge architect fee lower than the scale provided by the Architects (Scale of Minimum Fees) Rules 1986, is deemed illegal and the contract is voided, then Permaju Arbitration will not proceed to hearing stage in Part 2. The tribunal delivered Partial Award No 2 dismissing the allegation of illegality in David Shen's action. In the circumstances, Permaju arbitration will proceed to hearing.

[67] It is an undisputed fact that at the commencement of the arbitral hearing on 26 January 2016, counsel for the plaintiff had proposed to the tribunal that the issue of liability in the Hardie arbitration be determined first before venturing into the defendant's tort claim in the other arbitration against Pemaju Industries Bhd ('Pemaju arbitration'). The plaintiff's proposal was premised on the argument that since the cause of action in the Pemaju arbitration is about inducing or procuring a breach of contract and the contract being the contract between the plaintiff and the defendant, if the tribunal determines at the end of the day that there is no breach of contract between the plaintiff and the defendant, then the Pemaju arbitration will fall because Pemaju cannot then be held liable for inducing a breach if there is no wrongful termination of the said agreement.

[68] It was further suggested that if the tribunal finds there was indeed a breach of contract, then there is no need for the parties to go back to adduce further evidence for the Pemaju arbitration in relation to the issue of breach of contract but the further evidence will be confined to the issue whether Pemaju procured or induced the breach of contract. Initially the defendant did not agree to the bifurcation of the arbitral hearings but relented after hearing the views of the learned arbitrator.

[69] As can be seen from the pleadings and the pre-hearing arguments on 26 January 2016, the issue whether the contract for architectural services has been correctly terminated by the plaintiff was a central and live issue in both arbitrations which both parties have appointed the tribunal to determine. They were the very matters referred or submitted to the learned arbitrator for determination under the bifurcated procedure which was suggested by the plaintiff in the first place. Thus, the plaintiff's allegation that the learned arbitrator/tribunal had dealt with a dispute which is outside the terms of the

submission to arbitration is totally without any substance. It is common ground that the hearing proceeded with the taking evidence on the issue of liability and quantum in relation to the Hardie arbitration including the counterclaim filed by the plaintiff.

[70] I am therefore with the defendant's counsel that the plaintiff was not prejudiced by the tribunal whilst the Partial Award No 3 was given as parties were allowed to file their updated submissions on the issue of quantum. The learned tribunal did not act outside of its jurisdiction to direct parties to file additional submission prior to the Partial Award No 3.

[71] In reference to the case of *London Export Corporation* referred to by the plaintiff's counsel, I am with the defendant's counsel that it can be easily distinguished from the present case as that case concerns the customary practice procedure of a trade association and its appeal board. The ratio in that case does not carry much weight in the present case as this matter is not a dispute whether the procedure under the original arbitration agreement was complied with but one whether an arbitrator has the liberty to make a finding on how proceedings are carried out.

[72] Similarly with that case of *Ken Grouting*, the facts can be easily distinguished as the mentioned case dealt with an arbitrator failing to make an award within the time specified within the PAM Rules. This dealt with an issue significantly different from what is pleaded and has no bearing to the facts of the present case.

[73] In regards to the case *Bumimetro Construction Sdn Bhd v Monday-Off Development Sdn Bhd & other cases* [2018] 1 LNS 2137, I am of the considered opinion and I agree with the defendant's counsel that the case actually supports the defendant's position. It is pertinent to note that at paras [79], [84] and [85] where Justice Azizah Hj Nawawi has this to say:

> [79] Therefore, I agree with the claimant that parties have agreed to one arbitration before a single arbitrator, but this does not entail 'one award' as suggested by the respondent, since it is trite that one arbitration can lead to a number of interim, partial and final awards.
>
> ...
>
> [84] On issue (ii), I agree with the claimant that the arbitrator had considered that under s 2(1) of the AA 2005, an award is defined include final, interim or partial award and s 21(2) provides that in the absence of parties' agreement, the AA 2005 permits the arbitrator to conduct the arbitration as he considers appropriate.
>
> [85] In *Ranhill Bersatu Sdn Bhd v. Safege Consulting Engineers & Anor* [2004] 3 MLJ 554, it was decided that unless the parties specifically remove the arbitrator's power on procedure, the arbitrator is the master of procedure and has complete discretion

to determine how the arbitration is to be conducted, so long as he does not contravene the express provisions of the Arbitration Act.

[74] With regards to the text from Gary B Born, *International Commercial Arbitration* cited by the plaintiff that:

> There are many circumstances where partial (or interim) awards are important to a constructive and efficient arbitral procedure. As with partial or interlocutory decisions in judicial proceedings, such awards allows a tribunal to decide a complex case in steps, enabling it and the parties to focus on and resolve issues sequentially, rather than in a single decision. This sometimes has very significant advantages in terms of efficiency and speed.
>
> *On the other hand, if the parties' arbitration agreement excludes partial awards, and requires a single award disposing of the entire dispute, that agreement must be given effect.*

Again, I am of the considered view that the quoted text does not advance the plaintiff's case herein as we are not dealing with a case where there is an express provision in the arbitration agreement excluding partial awards. It is clear in the proceedings on the 26 January 2016 which pointedly shows that it was the plaintiff's lead counsel who had requested the tribunal to bifurcate the hearing.

[75] The same argument will apply to the text taken from Fouchard, Gaillard, Goldman on *International Commercial Arbitration* which is cited at para 26 of the plaintiff's submissions.

[76] Having regard to the sequence of events, it is incorrect for the plaintiff herein to allege in para 4(s) of the affidavit in support that the learned arbitrator 'suddenly' expressed its intention to publish Partial Award No 3 in respect of the quantum for the Hardie arbitration. It is a legitimate exercise of the learned arbitrator's powers under the AA 2005.

[77] It is in evidence that on the 10 October 2020, the learned arbitrator informed the parties that in view of the uncertainties over the continuation of the Permaju Arbitration due to the Covid-19 situation and taking into consideration that complete submissions (liability and quantum) have been made for the Hardie arbitration, it is appropriate for the tribunal to render a quantum award for the Hardie arbitration (see 'DS32').

[78] The plaintiff's solicitors via letter dated 14 October 2020 (DS33) wrote to the learned arbitrator to protest against the making of the partial award on quantum. The defendant's solicitors responded to the plaintiff's protest vide their letter dated 15 October 2020 (DS34) addressed to the learned arbitrator. It is the defendant's stand that the making of the proposed Partial Award No 3

is within the jurisdiction of the learned arbitrator. Further, it is not disputed by the plaintiff that complete submissions have been made on the issue of liability and quantum.

[79] Further, it is an undisputed fact that the Partial Award No 3 made by the learned arbitrator is not the final award for the consolidated arbitrations. This is what the learned arbitrator has stated in para 4 of his Partial Award No 3:

> The second part of the proceeding will deal exclusively with the Pemaju arbitration and the decision to be published in the final award.

[80] Hence, I am of the view that there is no question of the said Partial Award No 3 breaching the terms of the arbitration agreements as alleged by the plaintiff in para 6 of the affidavit in support. Having chosen that step, it is not for the plaintiff to complain that there was a breach of cl 2.5 when the decision on the quantum turns out unfavourable to it.

ISSUE ON PRE-AWARD INTEREST

[81] To recapitulate, the learned arbitrator issued his Partial Award No 3 on 17 March 2021 where he found in favour of the defendant which includes a pre-award interest of RM1,943,374.40.

[82] Section 33(6) of the AA 2005:

> Unless otherwise provided in the arbitration agreement, the arbitral tribunal may:
>
> (a) award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realisation; and
>
> (b) determine the rate of interest.

[83] Learned counsel for the plaintiff submits that the tribunal is not empowered to grant any pre-award interest. The provisions of the amended the AA 2005 do not apply to the arbitration between the parties.

[84] It is submitted that the arbitration is governed by the pre-amendment AA 2005 as it stood on 22 November 2013 when the agreement to arbitrate dated 22 November 2013 was entered into by the plaintiff and defendant.

[85] Learned counsel referred and relied on the recent High Court case of *UDA Land Sdn Bhd v Puncak Sepakat Sdn Bhd* [2020] MLJU 892; [2020] 1 LNS 877 wherein the plaintiff in that case applied to set aside the arbitration award, by contending among others that the arbitrator wrongly awarded the defendant pre-award interest on its claim. It should also be noted that the arbitration proceedings in this case commenced in 2014, ie before the

Arbitration (Amendment) (No 2) Act 2018 ('Amendment Act') came into force on 8 May 2018 and the award was published after the amendment act came into force. In allowing the plaintiff's application to set aside the arbitration award, the learned High Court judge in this case held among others, that:

> [36] It is common ground that based on the Court of Appeal case of *Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang and another appeal* [2015] 4 MLJ 766; [2015] 8 CLJ 58 that the arbitrator did not have the power to award pre-award interest ... This Court of Appeal decision has been subsequently affirmed by the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang & Another Appeal* [2018] 1 MLJ 1; [2018] 1 CLJ 693; [2017] 1 LNS 1695.
>
> [37] It is also common ground that s 33(6) of the AA has been amended ...
>
> [38] ... the plaintiff contended that the amendment operated prospectively and thus did not apply and affect any legal proceeding or remedy which has already been instituted, continued or enforced in reliance on s 30 of the Interpretation Act 1967 ('the IA') such as in this arbitration proceedings before the arbitrator ...
>
> ...
>
> [40] On my review of the award, I find that the learned arbitrator published his award about ten months after the amendment to the AA has come into force .... *In the premises, I find and hold that the plaintiff had the accrued right upon commencement of the arbitration proceedings to have the arbitration conducted based on the AA as it stood at that point in time pursuant to s 30 (1)(b) of the IA. The learned arbitrator did not therefore have the power to award pre-award interest and was in error in so awarding it. In other words, he acted without jurisdiction or power and I so find and hold accordingly.*

[86] The plaintiff's counsel further refers to the more recent High Court case of *Mammoth Empire Construction Sdn Bhd v Kenwise Sdn Bhd and another summons* [2020] MLJU 1473; [2020] 1 LNS 1145 which held along the same lines as *UDA Land*. Reference were also made to the following cases:

(a) *Tokio Marine Insurans (M) Berhad v Hi-Poly Industries Sdn Bhd* [2020] MLJU 1446; [2020] 1 LNS 1477; and

(b) *Pembinaan Limbongan Setia Berhad v Josu Engineering Construction Sdn Bhd* [2020] MLJU 192; [2020] 1 LNS 111.

[87] The plaintiff further submits that the recent Federal Court decision in *Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal* [2020] 1 MLJ 174; [2020] 1 CLJ 299 at para 45 provides, inter alia, that:

> [45] ... *it is clear to us that in the absence of express words to such effect, a statute, nothwithstanding whether it is procedural or substantive, cannot be applied retrospectively to impair a substantive right. This settled legal position, we would say,*

accords well with and further amplifies those statutory provisions of the interpretation statute namely Act 388. To reiterate our point, it is important to note that the CIPAA in itself does not contain any provision stating that it has retrospective application. Parliament therefore clearly does not exercise its legislative power pursuant to art 66 cl (5) of the Federal Constitution and sub-ss 2(3), 19(1) and 43(a) of Act 388 to enact the CIPAA with retrospective effect. (Emphasis added.)

[88] Hence it was submitted that similar to CIPAA, the amendment act does not contain any provision stating that it has retrospective application.

[89] It should further be noted that the Federal Court in *Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals* [2020] 1 MLJ 311; [2020] 1 CLJ 193, and held, inter alia, that:

[43] *There is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used, or unless a contrary intention appears (Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1; [1983] 1 CLJ 11; [1983] CLJ Rep 56; *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749; [2014] 1 CLJ 207). In other words, there is, so to speak, a presumption that legislation speaks only as to the future (*West v Gwynne* [1911] 2 Ch 1). (Emphasis added.)

[90] It was submitted that the arbitrator's decision in the present case to award pre-award interest in Partial Award No 3 would go against the intent and purpose of the pre-amended AA 2005 as well as the Federal Court's decision in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693 at para 187.

[91] Contrary to what the plaintiff is contending, the defendant submits that following the amendment made to s 33(6) of the AA ('amending act') which came into force on 8 May 2018, the learned arbitrator is now empowered to grant pre-award interest on the outstanding fees. It is further submitted that the important criteria to determine whether the new provision is intended to have retrospective effect, is to see whether it will impair any substantive right of the plaintiff.

[92] The defendant submits that s 33(6) of the amending act did not impair any prior right of the plaintiff. This is because the lack of power on an arbitrator to grant pre-award interest is not a right conferred on any party to an arbitral proceeding. Hence, the amendment did not take away any right from either party. In any event, under the settlement agreement, the plaintiff agreed to pay interest at the rate of 8%pa to the defendant for any instalments that were in arrears. The amending act did not therefore put the plaintiff in any worse off position.

[93] It was further submitted that the decision of Datuk Lim Chong Fong J in *UDA Land Sdn Bhd* cited by the plaintiff's submissions ought not to be followed by this court. The reasoning of His Lordship is not consonant with the decision of the higher courts relating to the interpretation of statutes. His Lordship did not make any determination as to whether the amended provision affected any prior right to the other party. His Lordship did not carry out an in-depth analysis of the decided cases before reaching his decision. His finding is contained in one paragraph — see para [40]. It seems he relied solely on the dicta of Gunn Chit Tuan CJ (Malaya) in *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99 to reach his decision. There are several other leading cases indicating how statutes are to be construed. He merely said that the plaintiff had the accrued right upon commencement of the arbitration proceedings to have the arbitration conducted based on the Arbitration Act as it stood at that point in time. This is taking a very simplistic approach to such an important issue. It is respectfully submitted that this is a wrong approach in construing the amended provisions.

[94] Perusing the case of *UDA Land Sdn Bhd*, I am with the plaintiff that Datuk Lim Chong Fong J had referred to the decision of the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693 and relied on s 30(1)(b) of the Interpretation Acts 1948 and 1967. As such, the defendant's arguments on the *UDA Land Sdn Bhd* case are misconceived and flawed.

[95] The defendant also relied on interpretation of statute in the case of *AMDAC (M) Sdn Bhd v BYD Auto Industry Co Ltd* [2020] 11 MLJ 281; [2020] 6 CLJ 625 regarding the operation of s 42 of the amending act that s 42 in the amending act to be given retrospective effect just as Parliament intended. It was submitted that this is the preferred approach as it is in line with the decided cases. Since s 42 can be given retrospective effect, there is no reason why s 33(6) of the amending act cannot have the same retrospective effect, particularly when the intention of Parliament is to rectify an anomaly which has deprived a successful claimant of its right to received pre-award interest.

[96] It is further submitted that whilst the decisions in *UDA Land Sdn Bhd* and *Mammoth Empire Construction Sdn Bhd* were content to follow the general principle in s 30(1)(b), that the statute cannot take away any accrued/vested right of a party unless clear words in the statute said otherwise, Justice S Nathan Balan in *AMDAC* feels compelled to take further steps to investigate how Parliament intended for the amendment to apply. Clearly His Lordship was concerned that a prospective repeal of s 42 would mean multitudes of awards in pending arbitrations will be coming to the court through the s 42 route for several years until all pre-8 May 2018 arbitrations has run its course. This

would lead to a rather invidious uncertain situation not intended by Parliament.

[97] As pointed out by the plaintiff the case of *AMDAC* does not concern s 33(6) of either the pre-amended or amended AA 2005. In fact, it does not deal with the issue of pre-award interest at all. Hence, this case is of no relevance whatsoever to the defendant's arguments on this ground and should be disregarded.

[98] Indeed, the relevant case dealing with interest is the case of *UDA Land Sdn Bhd v Puncak Sepakat Sdn Bhd* [2020] MLJU 892; [2020] 1 LNS 877. It should also be noted that the case of *Mammoth Empire Construction Sdn Bhd v Kenwise Sdn Bhd and another summons* [2020] MLJU 1473; [2020] 1 LNS 1145 which held along the same lines as *UDA Land*, declined to follow the *AMDAC* case (see para 15 of the judgment).

[99] It also should be noted that the *AMDAC* case was decided before the Federal Court's decision in *Jack-in-Pile* and *Ireka Engineering*. The Federal Court has already made it clear that express words are necessary for a statute to be given retrospective effect.

[100] The plaintiff maintains that this issue on pre-award interest is now settled beyond contestation by the Federal Court in *Far East Holding*. More importantly, the plaintiff points out that that decision is binding on this court.

[101] To the questions posed in *Far East Holding*, the Federal Court held that:

> [187] Unless otherwise provided in the arbitration agreement, an arbitrator could only award post-award interest. The AA 2005 does not contemplate the award of pre-award interest, unless so provided in the arbitration agreement. There was no indication that pre-award interest was provided in the arbitration agreement. Pre-award interest could not be awarded. Post-award interest may be granted. But since post-award interest was not pleaded, it would not seem fair that the discretion to award interest should be exercised in favour of post-award interest.

[102] The needs to be appreciated that an arbitrator's power to grant pre-award interest is derived from contract, ie, the submission of the dispute by the parties to the arbitrator (which impliedly gave the arbitrator the same powers as if the dispute is heard in court), and not from the statute. In the present case, there was no such power ever agreed when the parties submit the dispute to the arbitrator.

[103] By operation of the doctrine of stare decisis, this court is bound by the decision of the Federal Court on the issue of law as to whether an arbitrator

may grant pre-award interest, in the absence of any provision in the arbitration agreement permitting the arbitrator to do so.

[104] As regard to the defendant's argument that ' ... the plaintiff agreed to pay interest at the rate of 8%pa to the defendant ...', I am with the plaintiff that the arbitrator had no jurisdiction whatsoever to grant pre-award interest as this arbitration is governed by the pre-amended AA 2005. In this regard, irrespective of whether the defendant is or was entitled to such an interest, the arbitrator had no jurisdiction to award any pre-award interest to the defendant.

[105] In the circumstance for the plaintiff's application under BKI-24NCC(ARB)-3/6 of 2021, I am constrained to set aside only the award of pre-award interest of RM1,943,374.40 at para (b) of Partial Award No 3.

[106] I shall now proceed to considered the application by David Shen under BKI-24NCC(ARB)-4/6 of 2021(HC5).

RECOGNITION AND ENFORCEMENT APPLICATION

BKI-24NCC(ARB)-4/6 of 2021(HC5)

[107] Under the application filed in BKI-24NCC(ARB)-4/6 of 2021(HC5), David Shen is seeking to register and enforce the Partial Award No 3 ie be recognised as binding and be enforced by entry as a judgment against Hardie Development ('the defendant') in terms of the said Partial Award No 3.

[108] The application for enforcement of the Partial Award No 3 is supported by the affidavit affirmed by David Shen I-Tan dated 21 June 2021 (encl no 2). Hardie Development has filed an affidavit in reply sworn to by Sim Men Kin @ Andrew Sim dated 8 July 2021 (encl no 3].

[109] Learned counsel for David Shen submits that the statutory requirements in respect of this application, including ss 38 and 50 have been met. It is an undisputed fact that the Partial Award No 3 made by the learned arbitrator dated 17 March 2021, is an award made in accordance with the arbitration agreement and fully compliant with the Arbitration Act 2005, which is binding on the parties.

[110] In addition, it was submitted that the defendant (Hardie Development) had not complied with the award under Partial Award No 3, giving rise to the need of registration with this court in accordance with ss 38 and 50 of the Arbitration Act 2005.

[111] The provisions of s 38 of the AA 2005 stipulates that:

38 Recognition and enforcement

(1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State *shall*, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.

(2) In an application under subsection (1) the applicant shall produce —

(a) the duly authenticated original award or a duly certified copy of the award; and

(b) the original arbitration agreement or a duly certified copy of the agreement.

(3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

(4) For the purposes of this Act, 'foreign State' means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.

[112] The wording of s 38(1) of the AA 2005 is cast in mandatory language by the use of the word 'shall'.

[113] Apart from compliance with s 38 of the AA 2005, based on the agreement of the parties as set out in para [4] above, it follows that the application in BKI-24NCC(ARB)-4/6 of 2021 (HC5) must be allowed except for the pre-award interest (see findings at paras [80] to [104] above).

CONCLUSION

[114] Having considered the applications by both parties and considering the cause papers, the written and oral submissions, the followings are my findings of Hardie Development's application under BKI-24NCC(ARB)-3/6 of 2021:

(a) allegation that Partial Award No 3 is not in accordance with the agreement of the parties (quantum):

> There is no question of the said Partial Award No 3 breaching the terms of the arbitration agreements as alleged by the plaintiff in paragraph 6 of the Affidavit in Support. Having chosen that step, it is not for the plaintiff to complain that there was a breach of Clause 2.5 when the decision on the quantum turns out unfavourable to it.

(b) pre-award interest:

By operation of the doctrine of stare decisis, this court is bound by the decision of the Federal Court in *Far East Holding* on the issue of law as to whether an arbitrator may grant pre-award interest, in the absence of any provision in the arbitration agreement permitting the arbitrator to do so.

As regard to the defendant's argument that ' ... the plaintiff agreed to pay interest at the rate of 8%pa to the defendant ...', I am with the plaintiff that the arbitrator had no jurisdiction whatsoever to grant pre-award interest as this arbitration is governed by the pre-amended AA 2005. In this regard, irrespective of whether the defendant is or was entitled to such an interest, the arbitrator had no jurisdiction to award any pre-award interest to the defendant.

[115] In the circumstance for the plaintiff's application under BKI-24NCC(ARB)-3/6 of 2021, I am constrained to set aside only the award of pre-award interest of RM1,943,374.40 at para (b) of Partial Award No 3.

[116] As agreed by parties that the decision on BKI-24NCC(ARB)-3/6 of 2021 will determine the outcome of BKI-24NCC(ARB)-4/6 of 2021 (HC5), being only the pre-award interest of RM1,943,374.40 at para (b) of Partial Award No 3 is set aside, the awards at para (a), (c) and (d) of Partial Award No 3 be enforced by entry as a judgment against Hardie Development pursuant to s 38 of the AA 2005.

[117] For both applications under BKI-24NCC(ARB)-3/6 of 2021 and BKI-24NCC(ARB)-4/6 of 2021 (HC5), each party shall bear its own costs.

Pre-award interest at para (b) of Partial Award No 3 set aside; paras (a), (c) and (d) of Partial Award No 3 enforced by entry as judgment against plaintiff pursuant to s 38 of Arbitration Act 2005.

Reported by Dzulqarnain Ab Fatar